Leow Kooi Wah v Philip Ng Kok Seng & Anor

HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33–54 OF 1990
MAHADEV SHANKAR J
29 MARCH 1997

Family Law *— Divorce — Ancillary matters — Claim for maintenance of wife and children — Claim against co-respondent — Apportionment of blame for the breakdown in the marriage — Division of matrimonial property — Duty to make fullest disclosure of financial position of parties in order to determine maintenance payable — Whether claim for lump sum payment in addition to maintenance should be allowed — Law Reform (Marriage and Divorce) Act 1976 ss 58(3)(b), 76 & 78 — Divorce and Matrimonial Proceedings Rules 1980 rr 33, 51, 56, 61, 62 & 65*

Family Law *— Divorce — Maintenance payable — EPF savings — Whether EPF savings could be used to pay maintenance — Mechanics of ensuring that the EPF money of one spouse is paid to the aggrieved spouse and children —Whether a separate vesting order was necessary — Employees Provident Fund Act 1991 s 51 — Employees Provident Fund Regulations 1991 regs 6–7, 34–36*

The petitioner wife, pursuant to r 56 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') prayed, inter alia, that: (i) the respondent husband pay a monthly sum of RM1,473.25 as maintenance for herself and her two children; (ii) the respondent pay a lump sum of RM135,000 to the petitioner; (iii) the co-respondent pay RM200,000 by way of damages; and (iv) the respondent be given reasonable access to the children.

The respondent's feelings towards the petitioner started cooling off in 1986 when the co-respondent came into his life. The petitioner did not take any aggressive steps at the very onset to compel the respondent to terminate the relationship and in her evidence said that she hoped the affair would 'blow out'. In 1988, the co-respondent moved into the matrimonial home. In September of that year, the respondent transferred his half share of the matrimonial home to the petitioner. By November, the situation was so intolerable that the petitioner left the matrimonial home. The following year, the co-respondent gave birth to her first child with the respondent. The respondent subsequently vacated the matrimonial home. The respondent did not claimed any share to the house in his pleadings, but at the hearing regarded himself as owning a half share. The issue was whether the petitioner was the sole and beneficial owner of the house.

Other issues before the court were with regard to the apportionment of blame for the breakdown in the marriage and the determination of the financial situation of the parties in order to decide on the maintenance payable. On the latter, the respondent had, via his affidavit filed in 1992, claimed to earned RM1,768.25 per month though this was disputed by the petitioner. Both the respondent and co-respondent failed to submit any documentations as to their true financial position. Counsel for the respondent

submitted that the court could resort to the respondent's EPF money to secure the lump sum payment to the petitioner. Therefore, the court had to consider the mechanics of ensuring that the EPF money of one spouse is paid to the aggrieved spouse and children.

Held:

(1) In view of the loss of any contact by the respondent with his children since 1991, the respondent was given leave to apply to the court for access to the children which should only be granted after the respondent has satisfied the court that such application was made in good faith and that access given would be in the children's best interests. Until such an order was made, the respondent was not to interfere in any way with the petitioner's custody, care and control of the children (see p 139F–G).

(2) On the facts to the case, it was clear that the petitioner should not be blamed for the breakdown of the marriage and the respondent alone was responsible for the breakdown of the marriage aided and abetted by the co-respondent (see p 141B).

(3) Notwithstanding s 76 of the Law Reform (Marriage and Divorce) Act 1976, the circumstances of this case did not call for any division of the matrimonial home because the respondent's contribution to the welfare of the family and the needs of his children were negative, and the little that the respondent did contribute was more than off-set by the petitioner's burden in carrying the mortgage and looking after the house. The petitioner shall continue to be the sole and beneficial owner of the house (see p 142G).

(4) Rules 61(2) and 65(4) of the Rules impose upon the parties a spontaneous duty to exercise utmost good faith in making the fullest disclosure of relevant information. Whatever disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath, the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings.

The cross-examination of the respondent produced disclosures which could not be reconciled with his affidavit that his total income in 1992 was RM1,768.25 per month. Without going into all the discrepancies and evasions in the respondent's evidence, it was not unsafe to infer that his monthly emoluments were in excess of RM4,000 per month (see pp 143I–144I).

(5) The final award for maintenance due from the respondent to the petitioner backdated to November 1988 was for a sum of RM113,400 due and payable with immediate effect.

As of 1 April 1997, the respondent must pay to the petitioner a sum of RM1,800 per month (for the petitioner and her two

children) until the first child reaches his 18th birthday and thereafter till the second child reaches her 18th birthday, the respondent shall pay the petitioner RM1,500 per month (for the petitioner and the second child). The respondent's liability for the petitioner's maintenance shall cease as from the date of the petitioner's death or remarriage.

With regard to the lump sum payment in addition to the maintenance claimed, it was clear that the purpose of the lump sum is to assist the petitioner to maintain herself and the children of the family. In other words, it does not constitute some separate head of entitlement. It is only a different mode of providing for the immediate requirements of the deserving spouse and the children where the circumstances so require. In the present case, there was no hard evidence of any capital assets in the respondent's possession. Therefore, the claim for a lump sum payment could not be allowed (see pp 145I and 146E–G).

(6) Since the respondent's solicitors had submitted that the respondent's EPF money could be used to secure the maintenance payable to the petitioner and her children, the petitioner's solicitors were to prepare the necessary statutory forms to be executed by the respondent to revoke his existing EPF nominees and nominate the petitioner and children as his sole nominees. In the exercise of the court's power to distribute a matrimonial asset, it was ordered that as and when the sums becomes payable, the EPF Board shall pay the money into court whereupon the petitioner and her children shall be entitled to be paid out of the same such amounts as are due to them by way of arrears of maintenance and the balance, if any, shall be paid out to the respondent's legal heirs. There was no need to make a separate vesting order as the Board is a statutory trustee and a copy of the order shall be served on the EPF Board (see p 149F–I).

(7) In the peculiar circumstances of the case, the co-respondent shall pay to the petitioner RM50,000 as damages due and payable with immediate effect (see p 150H).

[Bahasa Malaysia summary

Pempetisyen, si isteri, menurut k 56 Kaedah-Kaedah Prosiding Penceraian dan Perkahwinan 1980 (Kaedah-Kaedah tersebut') telah memohon, antara lain, supaya: (i) penentang, si suami, membayar jumlah bulanan sebanyak RM1,473.25 sebagai nafkah untuk dirinya serta dua orang anak; (ii) penentang membayar sekaligus jumlah sebanyak RM135,000 kepada pempetisyen; (iii) penentang bersama membayar RM200,000 sebagai gantirugi; dan (iv) penentang diberi akses yang munasabah kepada anaknya.

Perasaan penentang terhadap pempetisyen telah mulai reda apabila penentang bersama muncul dalam kehidupannya. Pempetisyen telah tidak mengambil langkah-langkah yang tegas pada permulaannya untuk memaksa penentang menamatkan perhubungannya dengan

penentang bersama dan dalam keterangannya dia telah menyatakan bahawa dia telah harap bahawa perhubungan tersebut akan padam sendiri. Dalam tahun 1988, penentang bersama telah berpindah ke rumah perkahwinannya. Dalam bulan September tahun itu, penentang telah memindahkan separuh bahagiannya dalam rumah perkahwinan tersebut kepada pempetisyen. Tiba bulan November, keadaan menjadi begitu teruk sehingga pempetisyen telah meninggalkan rumah perkahwinan. Pada tahun yang berikutnya, penentang bersama telah melahirkan anak pertamanya dengan penentang. Penentang kemudiannya telah meninggalkan rumah perkahwinan tersebut. Penentang telah tidak menuntut mana-mana bahagian dalam rumah tersebut dalam plidingnya, tetapi semasa perbicaraan dia menganggap dirinya sebagai memiliki separuh bahagian rumah tersebut. Isunya adalah sama ada pempetisyen adalah pemilik tunggal dan benefisial rumah tersebut.

Isu-isu lain di hadapan mahkamah adalah berkenaan dengan pembahagian kesalahan untuk kegagalan perkahwinan itu dan penentuan keadaan kewangan pihak-pihak supaya keputusan bayaran nafkah dapat dibuat. Atas isu yang kedua, penentang, melalui afidavit yang difailkan dalam tahun 1992, telah menyatakan bahawa dia memperolehi pendapatan sebanyak RM1,768.25 setiap bulan walaupun ini telah dipertikaikan oleh pempetisyen. Kedua-dua penentang dan penentang bersama gagal mengemukakan dokumen mengenai kedudukan kewangan mereka yang sebenar. Peguam bagi pihak penentang telah berhujah bahawa mahkamah boleh mengalih kepada wang KWSP untuk mendapatkan jumlah wang sekaligus untuk pempetisyen. Maka mahkamah terpaksa mempertimbangkan cara bagaimana mendapatkan wang KWSP satu pihak untuk dibayar kepada pihak yang terkilan serta anaknya.

Diputuskan:

(1) Memandangkan penamatan perhubungan oleh penentang dengan anaknya sejak tahun 1991, penentang telah diberi kebenaran untuk memohon kepada mahkamah untuk akses kepada anaknya yang hanya patut diberi setelah penentang telah memuaskan hati mahkamah bahawa permohon sedemikian telah dibuat dengan ikhlas dan bahawa akses yang diberi adalah untuk kepentingan anak-anaknya. Sehingga perintah tersebut dibuat, penentang tidak boleh mengganggu dalam mana-mana cara pun dengan jagaan, kawalan dan pemeliharaan anak-anaknya (lihat ms 139F–G).

(2) Berdasarkan fakta-fakta kes, adalah jelas bahawa pempetisyen tidak harus dipersalahkan untuk kegagalan perkahwinan dan penentang dengan sendirinya adalah bertanggungjawab untuk kegagalan perkahwinan tersebut dibantu dan disubahat oleh penentang bersama (lihat ms 141B).

(3) Tidak kira s 76 Akta Membaharui Undang-undang (Perkahwinan dan Perceraian) 1976, keadaan kes ini tidak memerlukan pembahagian rumah perkahwinan kerana sumbangan penentang

kepada kebajikan keluarga dan keperluan anak-anaknya adalah negatif, dan sedikit yang telah disumbangkan oleh penentang sudahpun dibalas dengan beban pempetisyen dalam menanggung gadai-janji dan menjaga rumah. Pempetisyen akan terus menjadi pemunya benefisial dan tunggal rumah tersebut (lihat ms 142G).

(4) Kaedah-kaedah 61(2) dan 65(4) Kaedah-Kaedah tersebut mengenakan tugas spontan atas pihak-pihak untuk menggunakan kejujuran dalam membuat pendedahan maklumat yang relevan. Mana-mana pendedahan yang dibuat melalui afidavit fakta, afidavit dokumen ataupun melalui keterangan bersumpah, tanggungjawab suami adalah supaya ianya jelas, terus-terang dan penuh. Apa-apa kekurangan suami dari darjah yang diperlukan biasanya dan akan diperbaiki oleh mahkamah dengan membuat inferens terhadap suami atas perkara-perkara berkenaan dengan kekurangan tersebut.

Pemeriksaan balas penentang telah menghasilkan pendedahan yang tidak dapat diselaraskan dengan afidavitnya bahawa pendapatan sepenuhnya dalam tahun 1992 adalah RM1,768.25 setiap bulan. Tanpa mengambil kira perselisihan dan pengelakan dalam keterangan penentang, adalah tidak selamat untuk membuat kesimpulan bahawa pendapatan bulanan suami adalah lebih daripada RM4,000 sebulan (lihat ms 143I–144I).

(5) Award muktamad mengenai nafkah yang terakru dari penentang kepada pempetisyen dibelakangkan tarikhnya ke November 1988 untuk jumlah sebanyak RM113,400 yang terakru dan berbayar dengan segera.

Pada tarikh 1 April 1997, penentang sepatutnya membayar kepada pempetisyen jumlah sebanyak RM1,800 sebulan (untuk pempetisyen dan dua orang anak) sehingga anak yang pertama menjangkau umur 18 tahun dan setelah itu sehingga anak keduanya menjangkau umur 18 tahun, penentang harus membayar pempetisyen RM1,500 sebulan (untuk pempetiseyn dan anak keduanya). Tanggungan penentang untuk nafkah pempetisyen akan berhenti dari tarikh kematian pempetisyen ataupun perkahwinannya semula.

Berkenaan dengan bayaran sekaligus sebagai tambahan kepada nafkah yang dituntut, adalah jelas bahawa tujuan bayaran tersebut adalah untuk membantu pempetisyen menanggung diri serta anak-anaknya. Dalam perkataan lain, ianya tidak terjumlah kepada tajuk yang berasingan tuntutan tersebut. Ianya hanya suatu cara lain untuk memperuntukkan keperluan-keperluan yang segera salah seorang pasangan suami isteri dan anak-anaknya di mana keadaannya memerlukan sedemikian. Dalam kes ini, tiada bukti kukuh mengenai aset utama dalam milikan penentang. Maka, tuntutan untuk bayaran sekaligus tidak dapat dibenarkan (lihat ms 145I dan 146E–G).

(6) Oleh kerana peguamcara penentang telah menghujahkan bahawa wang KWSP penentang dapat digunakan untuk memperolehi

nafkah yang harus dibayar kepada pempetisyen dan anak-anaknya, maka peguamcara pempetisyen harus menyediakan borang statutori yang perlu untuk dilaksanakan oleh penentang untuk membatalkan penerima namaannya dan menggantikannya dengan nama pempetisyen dan anak-anaknya sebagai penerima namaan yang tunggal. Dalam pelaksanaan kuasa mahkamah untuk membahagikan harta perkahwinan, adalah diperintahkan bahawa apabila dan semasa jumlah tersebut menjadi wajar dibayar, Lembaga KWSP akan membayar wang ke dalam mahkamah di mana pempetisyen dan anak-anaknya akan menjadi berhak dibayar dari jumlah tersebut jumlah yang wajar dibayar kepada mereka melalui tunggakan nafkah dan bakinya, jiakalau ada, akan dibayar kepada waris-waris yang sah. Tidak perlu membuat perintah letakhak yang berasingan kerana Lembaga adalah pemegang amanah statutori dan salinan perintah akan diserahkan kepada Lemabaga KWSP (lihat ms 149F–I).

(7) Dalam keadaan yang aneh kes ini, penentang bersama akan membayar kepada pempetisyen RM50,000 sebagai gantirugi yang terakru dan wajar dibayar dengan segera (lihat ms 150H).]

Notes

For cases on claim for ancillary reliefs, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1871–1875.

For cases on payment of maintenance, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1932, 1959, 1991–2064.

Cases referred to

Butterworth v Butterworth [1920] P 26 (refd)
Ching Seng Woah v Lim Shook Lin [1997] 1 MLJ 309 (folld)
J v J [1955] P 215 (folld)
Leow Kooi Wah (f) v Philip Ng Kok Seng [1995] 1 AMR 437 (refd)
Liversey v Jenkins [1985] FLR 813 (refd)

Legislation referred to

Employees Provident Fund Act 1991 s 51
Employees Provident Fund Regulations 1991 regs 6, 7
Employees Provident Fund Rules 1991 rr 34, 35, 36
Inheritance (Family Provision) Act 1971 s 3
Law Reform (Marriage and Divorce) Act 1976 ss 58(2), 58(3)(b), 78, 79
Divorce and Matrimonial Proceedings Rules 1980 rr 33, 51, 56, 61, 62, 65
Matrimonial Causes Rules 1977 rr 73, 74, 77 [Eng]

Chew Swee Yoke (*SY Chew & Co*) for the petitioner.
Nursinah bte Adzmi (Legal Aid Bureau) for the respondent and co-respondent.

Mahadev Shankar J: This is the sequel to my earlier judgment (reported in [1995] 1 AMR 437), wherein I directed that the parties be permitted to lead oral evidence and cross-examine each other in order that the court may finally decide what payments the respondent and co-respondent should make to satisfy the petitioner's monetary claims.

As required by r 56 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'), the ancillary reliefs prayed for in the petition are as follows:

(a) that the respondent pay RM1,473.25 per month as maintenance for the petitioner *and* her two children by the respondent;

(b) that the respondent pay a lump sum of RM135,000 to the petitioner;

(c) that the co-respondent ('Fifi') do pay RM200,000 by way of damages;

(d) that the respondent be given reasonable access to his children by the petitioner;

(e) that interest be paid at 8% per annum on the aforesaid sums of RM135,000 and RM200,000 till realization; and finally

(f) that the costs of this application be taxed and paid by the respondent to the petitioner.

The issue of access can be got out of the way immediately. From the time the petitioner left the matrimonial home in November 1988, it is manifestly evident that the respondent had become completely indifferent not only to the needs of the petitioner but also that of their two children, Isaac and Anne ('the children'). On 21 January 1991, the petitioner was granted custody, care and control of both of them. The three payments of RM200 each that the respondent made between November 1988 and January 1991 for their maintenance were derisory. His excuse that he stopped paying maintenance because he could not get access has to be rejected out of hand because he made no effort whatsoever to contact the children. In view of his loss of any contact with them since 1991, I order that the respondent be given leave to apply to this court for access which should be granted only after he has first satisfied the court that such application is made in good faith and that the access given will be in the children's best interests. Until such an order is made, I direct that he do not interfere in any way with the petitioner's custody, care and control of the children.

The degree of responsibility for the breakdown of the marriage

In determining the amount of maintenance to be paid to a spouse, 'the degree of responsibility to be apportioned to each party for the breakdown of the marriage' has to be taken into account by s 78 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

Ms Chew of counsel for the petitioner has pointed out that s 58(2) of the Act has specifically used the words 'the co-respondent be *condemned* in damages in respect of the alleged adultery'. I agree that the passage in my earlier judgment (see [1995] 1 AMR 437) at p 446 lines 26 and 27 is wrong and must stand corrected. But the problem remains. If the award is

not to include any exemplary or punitive element [s 58(3)(b)], how should the court assess the measure of damages where adultery is proved? There is an injury here for which amends have to be made, but what is the degree of responsibility for the adultery if the injured wife contributed to the situation by failing to take evasive action? A

Finding the right balance in this emotional tangle has caused me much anguish. My task has not been made any easier by the reluctance of the respondent and Fifi to come clean with an honest statement as to their income or their earning capabilities. B

I find as a fact that the respondent's feelings towards his wife started cooling off in 1986 when Fifi came into his life. The petitioner was then 35 years old. Isaac was then 5 years old and Anne aged 2. The petitioner was a full-time working mother. Isaac was a delicate child with respiratory problems that drove his parents to resort to faith healing. Both parents were church-going. C

Fifi was then about 22 years old. She was the respondent's business associate. Between 1986 and 1988, their physical and emotional attachment had become so strong that they virtually became inseparable. Fifi even accompanied the family to Cameron Highlands and on other outings. D

Curiously, the petitioner did not take any aggressive steps at the very outset to compel the respondent to terminate the relationship. The respondent and Fifi both claimed that by failing to protest, the petitioner had in fact connived and condoned their relationship. They produced photographs of all of them together on their outings. The petitioner's appearance in these photographs does not show any animosity towards Fifi. But then there is no evidence of the year in which these photos were taken. It could have been in the early stages when the petitioner did not suspect anything really untoward. E F

The petitioner's evidence is that she was caught on the horns of a dilemma as the situation deteriorated. She said that when she first expressed criticism of this relationship and the respondent's late nights out with Fifi, his reaction was to withdraw from her not just by going to sleep alone downstairs but by shutting her out of any mutual conversation. She feared that if she was too critical, he would walk out on the family altogether. So she tagged along hoping that the affair would blow out. G

It did not. By 1988, Fifi had moved into the matrimonial home. The way she carried on with the respondent pushed the petitioner to get the respondent to transfer his half share in the matrimonial home to her in September 1988. By November 1988, the petitioner found the situation so intolerable she left the matrimonial home with her daughter and went to stay with her brother. H

Should the petitioner be held to any extent responsible for the breakdown of the marriage? Her dilemma is older than the pyramids. It serves no useful purpose to speculate whether a tougher line may have scared off Fifi or merely hardened the respondent's resolve to be rid of the petitioner. In court, the petitioner seemed to be a timid woman who hated to make a fuss. She had sought the assistance of the respondent's brother. I

A He advised her not to quarrel with the respondent. The respondent's sister who lived with them did nothing to help. She was Fifi's business partner.

In these circumstances, it is the opinion of this court that the petitioner should not be blamed for the breakdown of the marriage. Her initial passivity, however, was a serious error of judgment. By the time she
B reacted, it was already too late. A more determined wife may have taken steps to eject Fifi when she moved into the matrimonial home, but the refusal of the respondent's brother and sister to help put matters right, the respondent's problems with his creditors at the time, the petitioner's resultant financial insecurity, her need to keep going daily to her job as a teacher and her concerns for the children as a working mother have all got
C to be taken into account.

Fifi says she thought her conduct was not wrong since she was the child of a second wife in a polygamous home. Even if she was blind to the fact that church-going Chinese are monogamous, why did she not openly ask the petitioner's permission that she be regarded as the respondent's
D second wife? By doing so, she would have had to acknowledge the petitioner's senior status. But Fifi did not care what the petitioner thought. She carried on her relationship regardless of the petitioner's feelings. If there had been a confrontation, she was confident that the respondent and the respondent's sister would have taken her side.

E The birth of Fifi's first child by the respondent on 28 April 1989 conclusively proves that the respondent and Fifi had been living in adultery since August 1988. It can be safely inferred that it had been going on much earlier. Having watched the respondent and Fifi give evidence, I am convinced that this on-going adultery began in 1986 or 1987 and continued after Fifi moved into the matrimonial home in 1988. I do not believe their
F denials that they did not have sexual intercourse in the matrimonial home. The petitioner's departure from the matrimonial home is proof enough that she found their behaviour intolerable. That she resorted to legal action soon afterwards is proof enough that there was no connivance or condonation.

The respondent testified, 'After the petitioner left the house in
G November 1988, I started to love Fifi with full force'. His neglect of the petitioner and the children thereafter was total. Isaac was sent off to live with the respondent's sisters in Singapore. A second child was born to the respondent and Fifi in October 1990.

The respondent sought to mitigate his conduct by claiming that the
H petitioner had been unsympathetic to his monetary problems when he was being hounded by some of his creditors who instituted suits against him in 1986–1988. He said the petitioner disowned him by publicly announcing that she did not want to be married to a bankrupt and that the transfer of his ½ share in the matrimonial home was to put his share out of the reach of his creditors. All the averments are not credible because they were never
I disclosed in any of his affidavits and came out for the first time at the hearing.

The real clue to the respondent's personality is his callous disregard of the financial requirements of the children. During the marriage, the respondent took all the petitioner's earnings. He mismanaged the family

finances. After the petitioner left, the respondent obviously thought the petitioner and her children must fend for themselves. I have no difficulty in concluding that the the respondent alone was totally responsible for the breakdown of this marriage aided and abetted by Fifi.

The respective financial position of the parties

The petitioner's assets and earnings

No 95 Jalan SS 26/9, Taman Mayang Jaya [HS(D)19776 PT 4494 Lot 17816 Mukim of Sungai Buloh] ('the matrimonial home') was the last address at which the parties co-habited. This property was originally purchased in 1985. The respondent took out RM9,500 from his Employees Provident Fund ('EPF') and the petitioner took out RM6,925.71 from hers. Both sums were paid into the joint account from which RM13,500 was paid to the developer as down payment. The petitioner got a Government loan for the balance of RM91,350 repayable over 25 years by 300 monthly instalments of RM482.12 which is deducted at source from her salary.

The petitioner has paid the quit rents, assessments and repair bills for this house. The respondent has produced some documentary evidence to show a financial contribution of RM16,806 for renovations early on, but very little else to prove any other contributions to the cost of the house or its maintenance and upkeep. He was initially registered as owner of a ½ share, but as stated earlier, he voluntarily transferred this ½ share to the petitioner in September 1988. In his pleadings and affidavits, he made no claim to any share of this house. But at the hearing he said he regarded himself as still owning a ½ share.

In February 1989, the petitioner sent the respondent a lawyer's notice to vacate the house. He did so. He did not claim then that he owned a ½ share.

Notwithstanding s 76 of the Act, I think that the circumstances of this case do not call for the court to order any division of this asset because the respondent's contribution to the welfare of his family and the needs of his children was negative, and the little that he did contribute was more than off-set by the petitioner's burden in carrying the mortgage and looking after the house.

The petitioner shall therefore continue to be the sole beneficial owner of this house. Subject to a valuation, I estimate its current value to be about RM200,000–RM250,000. The petitioner was renting it out for RM400 per month.

The petitioner's nett salary in 1994 was RM701.82. To supplement her income, the petitioner gave private tuition. She has put her total earnings at around RM1,500 per month.

She has provided detailed bills and documents to show that her monthly expenditure for herself and the children came to nearly RM1,475. All these figures were not challenged in cross-examination.

The respondent's financial position

In response to the petitioner's supporting affidavit claiming ancillary relief, the respondent filed an answering affidavit on 18 January 1992, stating that he has no assets whatsoever except his job as a salesman in Finnova Corp Sdn Bhd where he earned RM1,768.25 per month. But he gave his monthly expenditure as RM1,942.38.

Between January 1992 and the hearing in December 1995, the petitioner filed further affidavits in May 1992 (encl 31), October 1994 (encl 39) and March 1995 (encl 47). These affidavits gave very full details of the petitioner's earnings and expenditure, and the petitioner's estimates of the respondent's earnings from his salary, commissions and other earnings from his advertising businesses which he was said to have conducted with the co-respondent, ie Artree Advertising and Diamond Wood Sdn Bhd. The petitioner thought the respondent earned RM5,000–RM5,500 per month. The petitioner also referred to the respondent's Filipina maid which required proof to the authorities that his earnings were at least RM48,000 per year; and his holidays with Fifi in Canada. No affidavits were filed by the respondent denying these allegations.

Immediately after my first judgment in September 1994, and preparatory to the open court hearing to follow, the petitioner's solicitors served written notices to produce documents on both the respondent and Fifi. These notices are very detailed and called for all the documents related to their income and expenditure from 1988–1994, and their passports.

I regret to say that both the respondent and Fifi were very reticent about producing the necessary documentation to satisfy the court as to what their true financial position was.

Ms Chew has very correctly drawn the court's attention to the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules'), especially rr 61, 62 and 65. The material words in r 61(2) are as follows:

> 61 (2) Where a respondent ... is served with a notice ... of an application for ancillary relief ... *he shall* ... file an affidavit in answer to the application containing *full particulars* of his property and income, and if does not do so, the court may order him to file an affidavit containing such particulars.

and in r 65(4) the words are:

> 65 (4) Any party to an application for ancillary relief may by letter require any other party to give further information ... or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the registrar for directions.

I entirely agree with Ms Chew that these rules impose upon the parties a spontaneous duty to exercise the utmost good faith in making the fullest disclosure of all relevant information. The cases she cited of *J v J* [1955] P 215 and *Livesey v Jenkins* [1985] FLR 813 are very persuasive because rr 73, 74 and 77 of the English Matrimonial Causes Rules 1977 are very similar. I quote with approval what Sachs J said in *J v J*:

> ... where a husband is fully capable of and has had opportunity to explain those affairs, and where he seeks to minimize the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour ... .
>
> The effect has been that owing to the husband's grossly defective affidavit of documents, his failure to put before the court documents, the reticencies in his long examination-in-chief, and his complete omission to keep or produce (I know not which) books of account, there have been kept from the court vital facts which he ought to have made plain. His attitude, to my mind, has been throughout an attitude of 'catch me if you can'. In substance, he sought to give the impression of a man barely subsisting in a Nissen hut, and then to say 'disprove that and the consequent inferences if you can'.
>
> For a husband in maintenance proceedings simply to wait and hope that certain questions may not be asked in cross-examination is wholly wrong.
>
> In the light of this apparent misapprehension, it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when the evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings — in so far as such inferences can properly be drawn.

The cross-examination of the respondent produced disclosures which cannot be reconciled with his affidavit that his total income in 1992 was RM1,768.25 per month. His tax returns show his annual taxable income in 1992 was RM38,175 or RM3,181 per month. The corresponding figure for 1993 was RM3,142 per month. In 1994, the respondent held credit cards from Diner's Club, Master and Visa Cards from Hongkong Bank, and credit cards from Citibank and Chung Khiaw Bank. The minimum salary qualification to get such cards is RM24,000 per annum. His bank statements of his Hongkong Bank current account between February and August 1994 show other amounts credited which are well in excess of his monthly salary. For example, in February 1994 the excess totalled RM12,062. In the other months, they ranged from RM2,200 to RM2,900.

As for the advertising business of Artree and Diamond Wood Sdn Bhd, we have to start from the premise that in 1984 it was the respondent who was the seasoned businessman. Fifi was only 22 and just out of a school for commercial art. The respondent's sister, Helen has not been shown to be especially qualified. In the business cards produced, the respondent holds himself out as director. It is more reasonable to infer that the respondent set up these businesses and kept them going. In the absence of any documents from the Businesses or the Companies Registries, it must be inferred that these businesses are still ongoing. Furthermore, the respondent sought to explain the difference between his alleged monthly income of RM1,768.25 and his proven monthly expenditure in excess of that sum by saying that Fifi subsidized him. Without going into all the rest of the discrepancies and evasions in his evidence, I think it is not unsafe to infer that his monthly emoluments are in excess of RM4,000 per month.

Fifi's financial position

Rule 51 cited earlier does not apply to Fifi. Rule 33 does. It is self-evident that where an affidavit is filed, the deponent must respect the oath as regards the statements actually made under oath. Fifi filed an affidavit together with the respondent on 18 January 1992. She admitted the adultery but sought to rationalize it on the grounds already dealt with earlier. Their passion may be attributed to an inherent defect in the human psyche. The part she knowingly played in influencing the respondent to disregard the children cannot be condoned.

She stated that as Artree ceased business in 1989, she had no assets or income whatsoever and that all her necessities were provided for by the respondent. These statements cannot be reconciled with the respondent's claim that he was being subsidized by Fifi.

At the time of her cross-examination in November 1995, Fifi was doing business from her residence. She had an Indonesian maid to look after her two children by the respondent. Artree was producing a turnover of RM90,000 per annum in 1994 and had topped RM70,000 by November 1995. Fifi said she kept no accounts and chose not to produce copies of any of the income tax returns which she had filed.

The quantum of maintenance and the lump sum claimed

In her final submission, the respondent's counsel was instructed to offer RM200 per month to the petitioner *and* his two children by her. This is a good indicator of the character of this man and the extent to which he has forced the hand of judicial intervention. From November 1988 till I made the interim order in September 1994, all he had paid was RM600. After interim judgment, he paid RM1,000. Then nothing.

Under the interim judgment, the respondent's liability was as follows for maintenance:

(1)	For his daughter from December 1988 till December 1990 (25 months @ RM100 per month)	...	RM2,500
(2)	For both his children from January 1991 till September 1994 45 months @ RM200 per month less RM600 paid	...	RM8,400

The time has now come to assess what the final order should be for the maintenance for both the petitioner *and* her children. Isaac is now 16 and Anne is 13. All of them have been disgracefully neglected by the respondent. Doing the best I can on the evidence I have heard, my final award for maintenance backdated to November 1988 is as follows:

(1)	For the petitioner and her daughter from November 1988 till December 1990 @ RM1,000 per month 25 months	...	RM25,000
(2)	For January 1991 till September 1994 @ RM1,000 per month		

	(The petitioner RM500, Isaac RM300 and Anne RM200)		
	45 months	...	RM45,000
(3)	For October 1994 till end March 1997 @ RM1,500 per month		
	(The petitioner RM750, Isaac RM450, and Anne RM300)		
	30 months	...	RM 45,000
			RM115,000
	Less paid		1,600
	Now due and payable with immediate effect		RM113,400

I specifically order for the avoidance of any doubt that the petitioner may forthwith levy execution or take all other measures legally available to her to enforce recovery of this sum. The respondent's track record is so dismal that it is very likely that unless he is forced to, he will not pay.

As from 1 April 1997, I direct that the respondent do pay to the petitioner before the last day of each calendar month for her maintenance and that of Isaac and Anne the sum of RM1,800 per month (the petitioner RM900, Isaac RM540 and Anne RM360) until Isaac reaches his 18th birthday, ie on 22 October 1999. Thereafter, till Anne's 18th birthday on 29 June 2002, the respondent shall pay RM1,500 per month (the petitioner RM1,000, Anne RM500). The respondent's liability for the petitioner's maintenance shall cease as from the date of her death or remarriage.

The petitioner is asking for a lump sum payment *in addition* to the maintenance claimed. With respect, it is the opinion of this court that the purpose of the lump sum is to assist the petitioner *to maintain* herself and the children of the family. In other words, it does not constitute some separate head of entitlement. It is only a different mode of providing for the immediate requirements of the deserving spouse and the children where the circumstances so require.

In the present case, there is no hard evidence of any capital assets in the respondent's possession. The petitioner and the children reside in Penang. Both parents have a duty to maintain the children and, if ready money is required, the petitioner could sell the matrimonial home. What cannot be ignored, however, is that because of the respondent's disgraceful conduct, the arrears of maintenance have mounted up and it is high time to make amends.

In his cross-examination on 28 November 1995, the respondent testified that as of 31 December 1994 he had a credit of RM85,476.67 in his EPF. His membership number there is 2948772/T. In her final submission, the respondent's counsel was instructed by him to say that the court could resort to the respondent's EPF money to secure a lump sum

A to the petitioner. She must have had in mind s 79 of the Act which however provides:

> 79 Power for court to order security for maintenance
>
> The court may in its discretion when awarding maintenance *order the person liable* to pay such maintenance *to secure the whole or any part of it* B *by vesting any property in trustees* upon trust to pay such maintenance or part thereof out of the income from such property and, subject thereto, in trust for the settlor.

I have not had the benefit of any submissions from either counsel as to how the court should go about this, especially if the respondent has already C nominated some person other than the petitioner or the children to receive this money. Furthermore, it is to be observed that by s 79 of the Act, it is out of the *income* of the property to be used as security that the maintenance is to be paid.

Section 51 of the Employees Provident Fund Act 1991 ('the EPF D Act') reads:

> 51 Contributions and deposits not to be assigned or attached
>
> Notwithstanding anything to the contrary contained in any other written law —
>
> (a) no sum deducted from the wages of a member of the Fund under section 48; E
> (b) no amount payable by the employer as his contribution; and
> (c) no amount standing to the credit of a member of the Fund,
>
> shall be assignable, transferable, liable to be attached, sequestered, levied upon, for, or in respect of, any debt or claim whatsoever, nor shall the Official Assignee be entitled to or have any claim on any sum or amount. F

Subject to correction, the EPF Act itself does not provide for nomination but the relevant EPF Regulations 1991 are regs 6 and 7 which in material particular read as follows:

> 6 Power to make nominations
>
> G (1) Subject to the provisions of the rules made under the Act, a member of the Fund of the age of eighteen years or above may nominate any natural person to receive his credit due to him at his death in the prescribed form:
>
> Provided that the Board may in its discretion refuse to accept or register any such nomination. H
>
> (2) A nomination may be made in favour of one person or several persons and where there is more than one person nominated, the member of the Fund may in such form direct that specified shares be paid to one person or several persons nominated and in the absence of any such directions the Board shall pay the persons in equal shares. I
>
> 7 Revocation of nominations
>
> (1) A nomination shall be revoked —

(a) upon the death of the nominee, or, where there is more than one nominee, upon the death of all the nominees, during the life-time of the member of the Fund; A
(b) by written notice of revocation made on the prescribed form; or
(c) by any subsequent nomination in the prescribed form:

Provided that a nomination shall not be revoked by any will or by any other act, event or means whatsoever. B

(2) Where there is more than one nominee and one of the nominees predeceases the member of the Fund, in the absence of any subsequent nomination by such member disposing the share of the deceased nominee, such share shall revert to the estate of such member.

And the relevant EPF Rules 1991 are: C

34 Nominations to be made in Form EPF 4

(1) Every nomination shall be made in writing in Form EPF 4 and shall be signed by the member of the Fund in the presence of a witness, and the signature of such member shall be attested by the witness.

(2) Where a member of the Fund having made a nomination in D accordance with these Rules wishes to make a second or subsequent nomination he shall complete and forward a fresh Form EPF 4 containing such nomination.

(3) A nomination shall be of no effect unless the Form EPF 4 duly completed is sent and reaches the Board during the lifetime of the member. E

(4) Every nomination form registered shall be retained in safekeeping by the Board.

(5) Any person who attests the signature of the member of the Fund in respect of a nomination shall be disqualified from any benefit thereunder. F

35 Particulars to be furnished to the Board

Every member of the Fund shall, on making the nomination, furnish to the Board the following particulars —

(a) full name of member;
(b) membership number; G
(c) full name of nominee or nominees;
(d) Identity Card number or Birth Certificate number of nominee or nominees;
(e) relationship of the nominee or nominees with the member;
(f) the share nominated in respect of the nominee or each nominee if more than one nominee; and H
(g) any other particulars as may be approved by the Board for the purpose of identification of the nominee.

36 Notice of revocation of nomination to be made in Form EPF 4A

Every notice of revocation of a nomination shall be in Form EPF 4A and signed by the member of the Fund in the presence of a witness, who shall attest the signature of such member and the notice shall be I of no effect unless it is sent and reaches the Board during the lifetime of the member of the Fund.

A In *Ching Seng Woah v Lim Shook Lin* [1997] 1 MLJ 109, delivering the judgment of the Court of Appeal, we held that EPF is a matrimonial asset (see p 125). In that judgment, we did not address our minds to the mechanics of ensuring that the EPF money of one spouse is paid to the aggrieved spouse or the children.

B Admittedly, the EPF money cannot be attached, but the EPF Regulations and the Rules make it clear that provided the revocation is done in accordance with the statutory procedures, the EPF member can at any time before his 55th birthday extinguish the right of the pre-existing nominees. Thus, a member's EPF money is part and parcel of his assets which must be distributed to his legal beneficiaries in the event of his death C before he reaches 55 years of age.

Regulation 16(2) of the EPF Regulations 1991 recognizes that upon the death of a Muslim member of the Fund, a nominee does not receive the money as a beneficiary but only as an executor in accordance with Islamic law.

D No parallel provisions have been made in the EPF legislation for non-Muslims, but the philosophy of the EPF legislation is clear. The nomination cannot be utilized to defeat the legal rights of the next of kin to the extent that the member's testamentary capacity has been restricted by law.

Section 3 of the Inheritance (Family Provision) Act 1971 confers a statutory right on a surviving spouse and infant children or dependants E incapable of maintaining themselves to apply to court to order a payment out of the net estate of the deceased for their maintenance, unless the surviving spouse and children are already entitled to more than ⅔ of the deceased's estate. In other words, the deceased cannot dispose of more than ⅓, if the remaining ⅔ is not enough to maintain the surviving spouse and/or children.

F Since the respondent's solicitors has submitted that his EPF money could be used to secure the maintenance payable to the petitioner and the children, I direct that the petitioner's solicitors do prepare the statutory EPF forms required to be executed by the respondent to revoke any existing nomination he may have made, and nominate the petitioner and the children G to be his sole nominees. Within seven days of the forms being served on him, the respondent shall sign the same in the presence of the petitioner's solicitors who shall then submit the same to the EPF Board for registration.

As and when the same becomes payable, I further direct that the EPF Board shall pay into this court all money standing to the credit of the H respondent whereupon the petitioner and the children shall be entitled to be paid out of the same such amounts as are then due to them by way of arrears of maintenance and the balance, if any, shall be paid out to the respondent's legal heirs in accordance with law. This order is made in the exercise of the court's power to divide a matrimonial asset. There is no need to make a separate vesting order as the Board is a statutory trustee.

I In the event that the respondent satisfies this court that he has fully paid and/or otherwise secured the petitioner and the children for all sums due to them, he may apply to this court for leave to revoke the nominations

hereby ordered, but he shall not otherwise hereafter nominate any other party as his nominee. A sealed copy of this order shall be served on the EPF Board.

In the event that there is any difficulty about enforcing these provisions, and further orders are required, I give the parties liberty to apply and direct that the EPF Board shall be served with the papers and be allowed to have themselves added as parties hereto, since the Board's views will be most material on the further orders the court should make.

I have not lost sight of the fact that the respondent has another two children by Fifi to support. But as I have earlier observed, the duty to support children falls on both parents. Isaac and Anne have a prior equity upon the respondent's earnings. Fifi is gainfully employed and she must do the best she can for her children with what is left of the respondent's earnings after the petitioner has been paid off.

The quantum of damages to be awarded against Fifi

This area of the case has caused me some real difficulty. The factors which McCardie J listed in *Butterworth v Butterworth* [1920] P 26 must be viewed side by side with s 58(3)(b) of the Act which gives the court power to grant 'such damages as it thinks fit but so that the award shall not include any exemplary or punitive element'.

The apportionment of responsibility for the breakdown of the marriage envisaged by s 78 is confined to the wife and husband. Excluding the exemplary and punitive elements seems to mean that the court must exclude all concerns for moral or social outrage. What is left is compensatory damages. This is rooted in the duty of the court to restore the petitioner and the children, so far as money can, to the life they would have enjoyed if the break-up had not occurred. But who is to say how this family would have developed if Fifi had not come into their lives? This must be why the quantum has been left to the discretion of the court. Therefore such awards must of necessity be treated as decisions on their special facts. This was a particularly bad case.

In the present case, the troubles of the petitioner and the children are going to be further compounded if the respondent continues to be recalcitrant about meeting his obligations to them. For this on-going situation, Fifi must also take her share of responsibility. Doing the best I can in the peculiar circumstances of this case, I hold that RM50,000 would be a fair sum to award in damages against Fifi, which shall be due and payable with immediate effect.

Interest and costs

On the sum of RM113,400 awarded for arrears of maintenance, I award interest at 3% per annum from January 1991 to the date of this judgment. Thereafter on this amount, and on the damages of RM50,000 awarded against Fifi, interest shall accrue at 8% per annum from the date hereof till realization. Interest shall also accrue at 8% per annum on all future

payments of maintenance hereby ordered as from the last day of the calendar month in which the same falls due, up till realization.

The costs of these proceedings shall be taxed and paid jointly and severally by the respondent and Fifi.

Order accordingly.

Reported by Lew Chee Seong